

**Title 38 Decision Paper**  
**Department of Veterans Affairs (VA)**  
**Bay Pines VA Healthcare System, Bay Pines, Florida (Medical Center)**

**FACTS**

On August 18, 2016, the Bay Pines VA Healthcare System (Medical Center) announced a reassignment/shift change opportunity for a Registered Nurse (RN) Care Coordinator position in the Ambulatory Service/Nephrology Clinic. Attachment 1. The position was advertised as a reassignment of an RN on a day tour “with rare extended or weekend coverage.” *Id.* The announcement stated that the preferences for the position would be a RN with “at least 3-5 years of recent dialysis or nephrology clinical experience. BSN or MSN preferred. National Nursing Certification in Nephrology or Dialysis (CNN or CDN) is preferred.” *Id.*

Eight RNs applied for the vacant position. Attachment 2. During the initial screening, four of the eight RNs did not have either 3-5 years of recent dialysis or nephrology clinical experience, or a CNN or CDN as preferred, and were not granted an interview. Attachment 3. The remaining four RNs were interviewed by a panel and the candidate receiving the highest cumulative interview score was selected for the RN care coordinator position. *Id.* On October 3, 2016, the candidates were verbally informed of the selection results. Attachment 4.

On October 12, 2016, the American Federation of Government Employees, Local 548 (Union), filed a written step 2 grievance challenging the non-selection of two of the four interviewed candidates. Attachment 4. The nature of the grievance was identified as a violation of article 13, section 1E, of the collective bargaining agreement between VA and the American Federation of Government Employees (MA), which states, “If more employees volunteer than vacancies exist, [VA] will select from the qualified volunteers. *Seniority* will be the selection criterion.” *Id.* (emphasis in original). The grievance remedy requested by the Union was that the RN Care Coordinator selection be reversed and article 13, section 1, of the MA be applied to the selection process. *Id.*

On October 21, 2016, the Chief Nurse for the Medical Center’s Ambulatory and Specialty Care Clinic provided a written response to the Union’s grievance stating that article 13 of the MA does not apply, but even if it did, “the selection of the RN Nephrology Care Coordinator was based on criteria that involved the professional competence of the Nurses who applied.” Attachment 5. Consequently, it “is management’s position that the issues raised in [the] grievance relate to professional conduct or competence, and are not arbitrable” under 38 U.S.C. § 7422. *Id.*

On October 24, 2016, the Union filed a step 3 grievance. Attachment 6. On November 3, 2016, the Director of the Medical Center responded to the Union’s step 3 grievance and reiterated the position expressed by the Chief Nurse on October 21, 2016 in that it

“is management’s position that the issues raised in [the] grievance relate to professional conduct or competence, and are not arbitrable” under 38 U.S.C. § 7422. Attachment 9.

On November 28, 2016, the Union invoked arbitration. Attachment 13. On February 3, 2017, the Medical Center informed the Union that it planned to request a 38 U.S.C. § 7422 determination on the matter. Attachment 17. On April 28, 2017, the Medical Center formally requested a 38 U.S.C. § 7422 determination. Attachment 22. On May 5, 2017, the Union was notified about the Medical Center’s 38 U.S.C. § 7422 determination request and provided with an opportunity to respond. Attachment 23.

On May 19, 2017, the Union responded to the Medical Center’s 38 U.S.C. § 7422 request, stating that article 13, section 1E of the MA applies because the “voluntary reassignment of senior clinically competent RNs is within the scope of collective bargaining.” Attachment 24.

## **AUTHORITY**

The Secretary has final authority to determine whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b). On October 18, 2017, the Secretary delegated his authority to the Under Secretary for Health. Attachment 25.

## **ISSUE**

Whether the Union’s grievance involving the Medical Center’s use of specialized selection criteria rather than “seniority” when selecting an RN for a reassignment concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and thus is excluded from collective bargaining.

## **DISCUSSION**

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees, and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or employee compensation, as determined by the Secretary. “Professional conduct or competence” is defined to mean “direct patient care” and “clinical competence.” 38 U.S.C. § 7422(c).

Pursuant to 38 U.S.C. § 7451(a)(4), the Secretary has prescribed regulations (contained in VA Handbook 5005, part IV, chapter 3, section A, paragraphs 4c and 4d to implement assignments of Title 38 employees, including RNs. Attachment 20. In accordance with paragraph 4b and 4c, respectively, “primary consideration will be given to the efficient and effective accomplishment of the VA mission” and “[a]pproving officials will make

maximum use of an employee's skills and capabilities." *Id.* (VA Handbook 5005, part IV, chapter 3, section A, ¶¶ 4b-4c). In accordance with paragraph 4d, "[e]mployees will only be assigned duties and responsibilities for which they have appropriate credentials and there is a reasonable expectation that they will be able to perform satisfactorily." *Id.* (VA Handbook 5005, part IV, chapter 3, section A, ¶ 4d).

Article 13 of the MA addresses "Reassignment, Shift Changes, and Relocations" for Title 5 and Title 38 employees, including RNs. Attachment 30. Section 1(A) of MA article 13 defines a reassignment as "a change of an employee from one position to another while serving continuously within the Department, without promotion or demotion."<sup>1</sup> *Id.* Section 1(C) of MA article 13 states: "[i]f a reassignment, shift change, or relocation of a Title 38 employee involves an issue of professional conduct or competence, then 38 USC 7422 applies." *Id.* Section 1(E) of MA article 13 states: "[i]f more employees volunteer than vacancies exist, the Department will select from the qualified volunteers. Seniority will be the selection criterion." *Id.* Finally, section 1(F) of MA article 13 states: "Seniority shall be defined locally." *Id.*

Based on the Medical Center and Union's submissions, it is clear that the Medical Center selected the RN Care Coordinator based on the candidate's clinical competence qualifications rather than his/her seniority level.<sup>2</sup> The Medical Center clarified in its 38 U.S.C. § 7422 request that it performed an "initial screening" of the eight candidates for the vacant RN Care Coordinator position and "awarded points to measure clinical competency and or direct patient care qualifications for the position." Attachment 22. While the Medical Center "removed [four RNs] from consideration for failure to meet clinical competency and or direct patient care requirements for the position", the four remaining RNs proceeded to the interview phase, where they were "awarded points in three categories: Initial Screening Results, Interview and Reference Checks." *Id.* The candidate receiving the highest cumulative score in those categories was selected for the position. *Id.*

The Union's grievance seeks to override management's assessment of the applicants' relative clinical competence qualification by substituting "seniority" as the determining factor. In its response to the 38 U.S.C. § 7422 request, the Union asserted that by forwarding the four remaining RNs to the interview phase, the Medical Center determined those individuals met "all direct patient care requirements" and are "clinically

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<sup>1</sup> The Medical Center asserts that section 1(E) in MA article 13 does not apply because the announcement for the RN Care Coordinator position does not meet the definition of a reassignment in MA article 13, section 1(A). Attachments 5 & 9. Whereas MA article 13, section 1(A) defines a reassignment as "a change of an employee from one **position** to another," chapter 3 of VA Handbook 5005, entitled "Title 38 Assignments, Staff Adjustments, and Furloughs," defines a reassignment as "the temporary or permanent change: (1) From one **assignment** to another." Attachment 20 (VA Handbook 5005, pt. IV, ch. 3, § A, ¶ 3e) (emphasis added); Attachment 30. Based on the information submitted by the parties, it appears that the RN Care Coordinator position was a RN change in assignment to the Ambulatory Service/Nephrology Clinic. Attachments 4, 5, 6, & 9.

<sup>2</sup> Neither the Medical Center nor the Union's submissions identified how the parties locally defined seniority, or the specific seniority and bargaining unit status of the RN candidates.

competent.” Attachment 24. As a result, the Union argued that there was no “issue of professional conduct or competence involved and the Medical Center was required to apply seniority criteria when making its selection.” *Id.* In turn, the Medical Center argued that “seniority . . . does not equate to qualified” and that the RN Care Coordinator position required “critical reasoning and astute clinical competence in order to expedite appropriate care and treatment for patients with Chronic Renal Disease, End Stage Renal Disease and or wait listed for a kidney transplant requiring medical tests and exams.” Attachment 22. The Medical Center noted that the “RN Care Coordinator . . . interact[ed] with patients face to face, or use virtual strategies to communicate.” *Id.*

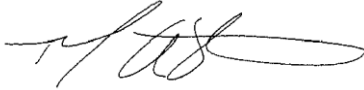
MA article 13 is not an article that solely applies to Title 38 employees. Attachment 30. While section 1(E) of MA article 13 permits seniority to be applied for selections among qualified volunteers, section 1(C) makes determinations about the clinical competence and qualifications of Title employees appointed under 38 U.S.C. § 7401(1), including RNs, subject to 38 U.S.C. § 7422. *Id.* The criteria that VA uses to assess and compare the relative qualifications and clinical competence among candidates for positions identified in 38 U.S.C. § 7401(1) are not subject to collective bargaining. 38 U.S.C. § 7422(b).

The Secretary has determined that 38 U.S.C. § 7422 bars grievances over selections for nursing positions that are based on candidates’ clinical competence in multiple instances. In *VAMC Salisbury*, VA considered mandatory seniority-based reassignment procedures, which the Union had negotiated with the VAMC in previous years. Attachment 26. The VAMC asserted that the seniority-based reassignment criteria were non-negotiable under 38 U.S.C. § 7422, because they prevented “management from selecting nurses to fill vacancies based upon the clinical competencies of the candidates.” *Id.* In that case, VA determined that the mandatory seniority-based criteria “involve[s] professional conduct or competence within the meaning of 38 U.S.C. § 7422 because requiring that management select the senior-most nurse for each vacancy – rather than place nurses according to their relative levels of clinical competence – has the potential to significantly impact the manner in which patient care is delivered.” *Id.*; see also Attachment 28 (*VAMC Erie*) (determining the non-selection of an RN to be a matter of professional conduct or competence); Attachment 27 (*Buffalo VAMC*) (determining a grievance over RN reassignment to be a matter of professional conduct or competence).

In this case, the criteria that the Medical Center used to assess and compare the clinical competence of the candidates for the RN Care Coordinator position is a matter that concerns or arises from direct patient care and clinical competence and consequently is excluded from collective bargaining.

**DECISION**

The Union's grievance concerning the Medical Center's use of specialized selection criteria rather than "seniority" when selecting an RN for a reassignment concerns or arises out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and is thereby excluded from collective bargaining.



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Richard A. Stone, M.D.  
Acting Under Secretary for Health

January 25, 2021

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Date